Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1268

PATRICIA R. HARRIS, Secretary, United States Department of Health, Education, and Welfare,

Appellant,

v.

CORA McRAE, JANE DOE, MARY DOE, SUSAN ROE, ANN MOE, Individually and on Behalf of All Others Similarly Situated; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., JANE HODGSON, M.D., DAVID B. BINGHAM, M.D., HUGH SAVAGE, M.D., EDGAR W. JACKSON, LEWIS H. KOPLIK, M.D., Individually and on Behalf of All Others Similarly Situated; WOMEN'S DIVISION OF THE BOARD OF GLOBAL MINISTRIES OF THE UNITED METHODIST CHURCH, THERESSA HOOVER, Its Associate General Secretary, ELLEN KIRBY, Its Executive Director,

Appellees,

and

SENATORS JAMES L. BUCKLEY and JESSE A. HELMS, CONGRESSMAN HENRY J. HYDE and ISABELLA M. PERNICONE, ESQ.,

Intervenors-Appellees,

and

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Appellee.

BRIEF OF REP. JIM WRIGHT, REP. JOHN J. RHODES, REP. ROBERT H. MICHEL, REP. LINDY BOGGS, REP. MARY ROSE OAKAR, SENATOR WILLIAM PROXMIRE, SENATOR THOMAS F. EAGLETON, SENATOR EDWARD ZORINSKY, AND CERTAIN OTHER MEMBERS OF THE CONGRESS OF THE UNITED STATES AS AMICI CURIAE.

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TABLE OF CONTENTS.

	Page
INTEREST OF THE *Amici Curiae*	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. The District Court's Order Violates the Appropriations Clause of Article I	7
The Three Deficiencies of the District Court's Order	8
The Extent of the Challenge to the Constitutional Authority of Congress	14
The Sources of the District Court's Error	21
II. The District Court Erred in Not Dismissing the Action as Nonjusticiable in That It Presented a Political Question	24
1. Textual Commitment of the Power to Congress	26
2. Lack of Judicially Manageable Standards	27
3. Impossibility of Deciding Without a Policy Determination of a Kind Clearly for Nonjudicial Discretion	29
4. Expression of Lack of Respect Due a Coordinate Branch of Government	29
5. Unusual Need for Unquestioning Adherence to a Political Decision Already Made	30
CONCLUSION	32

TABLE OF AUTHORITIES.

Cases: Page

Austin v. United States, 155 U. S. 417 (1894) 16, 17
Baker v. Carr, 369 U. S. 186 (1962) 25
Beal v. Doe, 432 U. S. 438 (1977) 22
Califano v. Wescott, — U. S. —, 61 L. Ed. 2d 382 (1979) ...21, 22
Cincinnati Soap Company v. United States, 301 U. S. 308 (1937) 16, 18
Collins v. United States, 15 Ct. Cl. 22 (1878) 18
Dandridge v. Williams, 397 U. S. 471 (1970) 31
Doe v. Bolton, 410 U. S. 179 (1973) 22
Doe v. Busbee, 471 F. Supp. 1326 (N. D. Ga. 1979) 8
Doe v. Matthews, 420 F. Supp. 865 (D. N. J. 1976) 18, 20
Gilligan v. Morgan, 413 U. S. 1 (1973) 26, 27
Hart v. United States, 118 U. S. 62 (1868) 16, 17
Hodgson v. Board of County Commissioners, Civ. No. 4-78-525 and Civ. No. 3-79-56 (D. Minn. 1979) 8
Knote v. United States, 95 U. S. 149 (1877) 16
Lovett v. United States, 66 F. Supp. 142 (Ct. Cl. 1945) aff'd on other grounds, 328 U. S. 303 (1946) 16, 18, 19, 21, 22, 23, 24, 25, 26
Maher v. Roe, 432 U. S. 464 (1977) 22
McRae v. Matthews, 421 F. Supp. 533 (E. D. N. Y. 1976) .. 21
McRae, et al. v. Secretary of Health, Education, and Welfare, et al., No. 76 C 1804 (E. D. N. Y. 1979) 8, 22, 24, 27
Milliken v. Bradley, 433 U. S. 267 (1977) 14
Planned Parenthood Affiliates of Ohio v. Rhodes, — F. Supp. — (S. D. Ohio, 1979) 8
Poelker v. Doe, 432 U. S. 519 (1977) 22
Preterm, Inc. v. Dukakis, 591 F. 2d 121 (1st Cir. 1979) 8
Reeside v. Walker, 52 U. S. (11 How.) 623 (1850) 16, 17, 18
Roe v. Wade, 410 U. S. 113 (1973) 22
Spaulding v. Douglas Aircraft Company, Inc., 60 F. Supp. 985 (S. D. Cal. 1945) 18
Stitzel-Weller Distilling v. Wickard, 118 F. 2d 19 (1941) ... 18
United States v. Klein, 80 U. S. (13 Wall.) 128 (1872) 17

TABLE OF AUTHORITIES (Continued).

Cases (Continued): Page

United States v. Nixon, 418 U. S. 683 (1974) 24
Welsh v. United States, 398 U. S. 333 (1970) 22

Constitutional Provisions:

U. S. Const., art. I, § 1 .....5, 7, 26
U. S. Const., art. I, § 8, cl. 16 26
U. S. Const., art. I, § 9 .....11, 17, 23
U. S. Const., art. I, § 9, cl. 7 .....5, 6, 7, 9, 20, 33
U. S. Const., art. III 24, 33

Statutes:

Medicaid Act, 42 U. S. C. § 1396, et seq. 8, 22
Pub. L. No. 95-431, § 103, 92 Stat. 1025 (1978) 9, 28
Pub. L. No. 95-480, § 102, 92 Stat. 1571 (1978) 28
Pub. L. No. 95-480, § 104, 92 Stat. 1589 (1978) 9, 28

Other Authorities:

BRYCE, THE AMERICAN COMMONWEALTH (MacMillian, 1905) 29
93 CONG. REC. 2973-75 (1947) 20
93 CONG. REC. 2977 (1947) 20
93 CONG. REC. 2987-91 (1947) 20
119 CONG. REC. 5086 (1973) 13
119 CONG. REC. 10160 (1973) 13
126 CONG. REC. 1062 (1980) 30
C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1935) 10
DEMOCRATIC STUDY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, "THE APPROPRIATIONS RIDER CONTROVERSY", SPECIAL REPORT No. 95-12, February 14, 1978 .. 11
L. FISHER, THE AUTHORIZATION-APPROPRIATIONS PROCESS: FORMAL RULES AND INFORMAL PRACTICES (Congressional Research Service, Library of Congress, 1979) 29
MONTESQUIEU, THE SPIRIT OF THE LAWS (6th ed., T. Nugent trans. 1792) 14

TABLE OF AUTHORITIES (Continued).

Other Authorities (Continued): Page

J. NOONAN, A PRIVATE CHOICE, 112-117 (1979) 29

REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, 93rd Congress, 2nd Sess. Report No. 93-1305 (1974) 13, 14

CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES (ed. Deschler) 9, 10, 19

THE FEDERALIST PAPERS, No. 58 (Mod. Lib. ed.) (J. Madison) 14, 15, 30

THE FEDERALIST PAPERS, No. 78 (Mod. Lib. ed.) (A. Hamilton) 15

The Washington Post, February 20, 1980, A 14 30

INTEREST OF THE AMICI CURIAE.

The *amici curiae* consist of 238 members of the Congress, including more than a majority of the members of the House of Representatives, as follows:

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1. Senator Jesse Helms, N. C., and Rep. Henry J. Hyde, Ill., 6th District, are not listed as *amici* solely because they are intervenors-appellees.

The *amici curiae*, as members of the Congress of the United States, are vested, by Article I, Section 1, of the Constitution, with all legislative powers granted in the Constitution. It is their sworn duty and common purpose to "support and defend" the Constitution of the United States.

Article I, Section 9, Clause 7 of the Constitution provides: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." The Congress is the sole law-making body under the Constitution. Clause 7 establishes the appropriations power in the Congress and the Congress alone.

In the present case, a judge of the United States District Court for the Eastern District of New York has held an appropriation act of the Congress unconstitutional and ordered the Congress to spend monies not appropriated.

It is the interest herein of the *amici curiae*, as members of the Congress, to protect the constitutional powers of that body over appropriations. Closely related to that interest, and of profound concern to the *amici*, is their interest in the preservation of that essential principle in the American Constitution known as the separation of powers.

The *amici* desire to point out to the Court that their interest in presenting this brief is not with respect to the question of abortion. The *amici* consist of members of the Congress who have voted for the Hyde Amendment (restricting the funding of abortions) and who have voted against that amendment.

The unique interests of the *amici* in protecting both the Congressional power of the purse and the principle of separation of powers have not been presented by other parties in this case. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT.

Independently of any other issue involved in this appeal is the primary concern of the members of Congress who are *amici* here, with respect to the separation of powers, the law-making power of the Congress, and the fact that the judgment of the court below violates the appropriations power of the Congress as given in Article I, Section 9, Clause 7 of the Constitution. The enactment known as the "Hyde Amendment" is an appropriations act according to long-established Congressional, executive and judicial understanding of the nature of appropriations. The district court erred in treating that enactment otherwise.

The appropriation and expenditure of tax funds is inherently a political question and therefore was explicitly left to that branch of our government which is closest to the people and most responsive to its needs and sensitivities. The frequent refusal of Congress to appropriate (as seen in riders to annual appropriations bills) points clearly to the inherently political nature of the appropriations process.

The case at bar involves an express refusal by the Congress to appropriate moneys in the exercise of an explicit constitutional grant of power. U. S. Const., art. I, § 9, cl. 7. This Court has never taken the position that the judiciary may oversee the appropriations process or set itself up as the ultimate arbiter of federal fiscal policy.

To so hold would embroil the judiciary in a process which would require constant and ongoing judicial balancing of competing political demands for limited financial resources. Such power was explicitly left to Congress by the founding fathers and any change should come pursuant to the Article V Amendment process, not by judicial decree.

ARGUMENT.

I. The District Court's Order Violates the Appropriations Clause of Article I.

The Constitution, Article I, Section 9, Clause 7, provides:

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

This language is plain and has been faithfully observed since its adoption. Until the instant case, it had governed the conduct of our government and marked an essential difference between the judicial and legislative branches.

The Court has before it a judicial order that challenges this section of the Constitution. That the order of the district court draws money from the Treasury, or attempts to draw it, can scarcely be denied. That, however, it appropriates money "by Law" must be denied. "By Law" refers to the legislative power, all of which is vested by Article I, Section 1, in the Congress. The district court's order, not, of course, being an appropriations bill, cannot draw money from the Treasury.

The district court's position can be paraphrased thus: "Congress appropriated the money for Medicaid with a condition which we find unconstitutional. We strike the condition. The appropriation already made by Congress now operates without the restriction which the condition had attached and funds the very activity for which the condition denied appropriations." That response, however, ignores the nature of the appropriations power, disregards the practice and the precedents of Congress, and

in the most fundamental way subverts the Constitution of the United States by making meaningless the reservation to Congress of the right to determine when "Money shall be drawn from the Treasury."

The Three Deficiencies of the District Court's Order.

1. That the Act before the Court is an appropriations act is beyond cavil. It is the annual Act appropriating money for the Departments of Labor and Health, Education and Welfare. Whether in the form of a regular appropriations act as in 1976 and 1978 or in the form of a Continuing Resolution as in 1977 and 1979, it supplies money. It originates in the House of Representatives. It is the object of deliberations by the Committee on Appropriations of the House. Like many other appropriations acts it says in so many words what it is appropriating money for and what it is not appropriating money for. In explicit terms it says it is not appropriating money to pay for abortions except in certain specific situations. Except for these situations, the Act says, "None of the funds contained in this act shall be used to perform abortions." The court below held the invalidated provision (the Hyde Amendment) to have effected a substantive change in the Medicaid Act, 42 U. S. C. § 1396, *et seq.* Slip op. 282-283. Accord, *Preterm, Inc. v. Dukakis,* 591 F. 2d 121 (1st Cir. 1979). While other courts have recently held to the contrary, *e.g., Doe v. Busbee,* 471 F. Supp. 1326 (N. D. Ga. 1979), *Hodgson v. Board of County Commissioners,* No. 4-78 Civ. 525 and No. 3-79 Civ. 56 (D. Minn. 1979), *Planned Parenthood Affiliates of Ohio v. Rhodes,* — F. Supp. — (S. D. Ohio 1979), *amici* consider the point irrelevant. Whatever its relationship to other enactments, the Hyde Amendment was part of an appropriation bill and an exercise of the appropriation power of the Congress.

"None of the funds contained in this act" is the language by which Congress has frequently refused to appropriate money for a specific purpose. For example, such language is used in 92 Stat. 1025 (1978), the general appropriations act for the State Department, to refuse to appropriate money for the promotion of the doctrine of one world government. The appropriations act for Labor and Health, Education and Welfare for that year uses the same language to refuse to appropriate money for any activities on behalf of any alien who is illegally in the country. 92 Stat. 1571 (1978). The same appropriations act uses the same language to refuse to appropriate money for a loan or salary to any individual at an institution of higher education who had used force to attempt to change the curriculum. 92 Stat. 1589 (1978).

Language of this kind is negative. It rejects a drawing from the Treasury. The negative cannot be converted by judicial magic into something positive. The refusal to draw cannot be made into a mandate to draw plus a condition.

The order of the court below treats "none of the funds contained in this act shall be used" as a condition. The wording is not the wording of a condition. Nothing in the Act, says, "Money is appropriated on condition that it not be spent for abortion." The only "conditions" in the act are the exceptions which specify the conditions under which abortion may be funded. If these exceptions are struck as too restrictive, there remains only the negative prohibition. Excising the exceptions which are stated leaves simply an absolute refusal to appropriate for abortion.

Under Rule XXI of the Rules of the House of Representatives, the language of refusal could not have been voted on in connection with an appropriations bill if the House had not deemed it to be language "retrenching

expenditure." CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, SEC. 835 (ed. Deschler, 1967). Substantially the present form of the retrenchment rule known as the "Holman Rule" had been adopted in 1876 and employed till 1885. It was revived in 1912 and has continued in effect until the present. *Ibid.* There is a substantial body of precedents indicating the House's understanding of the Rule. These precedents indicate that a limitation on the use of appropriated funds constitutes a decision not to appropriate for that purpose. See, *e.g.*, Ruling of the Chair, January 27, 1931 (limitation offered by Fiorello La Guardia). CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, 7.

In dozens of rulings on amendments offered under the Holman Rule, the House for over a century has taken the position that amendments so offered become, if accepted, part of the appropriations act itself. See, C. CANNON, *supra*, secs. 1431-1560 (1935). They are not considered separate legislation. If they are voted in, the appropriations act is limited by the words of the amendment. Consequently, when the Act says "None of the funds contanied in this act shall be used . . .," the Act no longer contains an appropriation for the purpose for which "none of the funds" can be used. Simply put, there are *no* funds appropriated for the proscribed purpose, and *none can become available unless Congress appropriates them anew.*

There can hardly be disagreement that it has always been understood that the formula used in a Holman Rule amendment is an *explicit* declaration that Congress is not appropriating for a use that might otherwise be thought to fall within the appropriation. After such an amendment has been accepted, no law exists by which an appropriation for this use has been made.

The district court's order, therefore, ignores the nature of the appropriations power. The order assumes that

there is some general sum appropriated with a variety of conditions attached which federal judges are free to alter if they think it constitutionally desirable. But the essence of the appropriations power is the ability to appropriate or not appropriate. Congress exercises that power when it says it is appropriating money and when it says it is not appropriating money. The power is fully and effectively exercised when Congress says it is not appropriating. Under our Constitution no federal judge is empowered to turn that negative into an affirmative.

2. The district court's order also disregards the practice and the precedents of Congress. For over a century, amendments of the Holman Rule type have been a central part of the appropriations process in Congress. The Democratic Study Group has observed that this kind of restriction has been used for a vast variety of purposes from controlling water projects to ending police activities in Vietnam and preventing the Central Intelligence Agency from destabilizing foreign governments. See DEMOCRATIC STUDY GROUP OF THE UNITED STATES, HOUSE OF REPRESENTATIVES, "THE APPROPRIATIONS RIDER CONTROVERSY," SPECIAL REPORT No. 95-12, February 14, 1978, p. 6. The explicit refusal to appropriate money for a specific purpose is an essential tool of democratic control of the business of bureaucratic government. To treat such explicit refusals to appropriate as conditions which a single federal judge may brush aside is to pay neither respect nor attention to the experience of a coordinate branch of government.

3. Finally, the district court's order subverts Article I, Section 9, of the Constitution. In an age marked by an immense increase in constitutional litigation it is remarkably easy to convert any disappointment on policy into a claim that a constitutional right has been infringed. If the court below is right, any group which has lost a legislative battle so completely that appropriations have

been explicitly denied them is free to rush into the federal courts—as the appellees did—obtain an injunction requiring the expenditure of money for the purpose for which Congress has explicitly refused to appropriate, and through the agency of a single federal judge achieve what the Constitution had committed to the care of Congress.

The district court's theory gives a power something like a line item veto to the federal judiciary. Given the ease with which policy disputes may be converted into constitutional questions, a loser in the legislative process can acquire a new forum by asking a federal judge to strike any specific refusal to appropriate, and on the theory of the court below the non-appropriation will become an appropriation. The power which a federal judge can thereby exercise is greater than the veto power of the President. The President can only reject entire acts, and he can never turn a non-appropriation into an appropriation. The district court's theory permits a federal judge to pick a specific provision, invalidate it, and by the very invalidation make appropriated what Congress had declined to appropriate.

Indeed if a federal court is empowered to change a refusal to appropriate into an appropriation because of a judge's constitutional misgivings, why not the President, too? The President is sworn to uphold the Constitution. If he deems a restriction in an appropriations act unconstitutional, why may he not, on the district court's theory, ignore the restriction and treat as appropriated what Congress had refused to appropriate? Neither in logic nor in practice could the Executive branch be asked to limit itself if the district court's view of the appropriation power is sound. Every federal district judge and the President and the President's appointees would have a charter to treat funds as appropriated in accord with their own understanding of the Constitution. If the integrity of the appropriations process as a power belonging to Congress is to be preserved, there can be no picking and choosing by President or court among provisions of an appropriations act. If an appropriations act is unconstitutional, let a court so say. But the appropriations power of Congress is gone if a court or the President may amend an appropriations act and turn a non-appropriation into an appropriation.

President Nixon, it may be recalled, picked and chose among provisions of an appropriations act and declared that he was impounding certain appropriated funds. This impoundment of over eight billion dollars was characterized as exercise of "a line item veto," and legislation was soon introduced to correct it. See 119 CONG. REC. 5086 (1973). It was noted that the President's action was contrary to the advice he had received from the Assistant Attorney General in charge of the Office of Legal Counsel. *Ibid.* It was observed that the President's action hurt "America's most disadvantaged groups" and at the same time destroyed the separation of powers. The President, it was pointed out, "is not empowered to sign the bill and then substitute an amount of his own choosing for that specified in the law." *Id.* at 10160. This invasion by President Nixon of the appropriations power was characterized as an "abuse of his powers" and given as an example of how President Nixon "systematically arrogated to himself the powers of Congress." See Additional Views of Rep. Holtzman, REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, 93rd Cong., 2nd Sess. Report No. 93-1305 (1974) p. 301; see also Additional Views of Mr. Conyers. *Id.* at p. 291. But what President Nixon did was far less than the district court did when it not only exercised a line item veto but turned a negative into an affirmative.

This is not a case like the *School Desegregation Cases* where the federal judiciary is enforcing the paramount law of the land against individual States and where, absent Eleventh Amendment problems, the Constitution poses no barrier to this Court's requiring the States to provide a remedy. Even in such a case a federal court order may have a "profoundly disturbing" financial impact, Powell, J., concurring in judgment, *Milliken v. Bradley*, 433 U. S. 267, 298, n. 3 (1977). This is a case where there is an express constitutional provision protecting a co-ordinate branch of the federal government.

The Extent of the Challenge to the Constitutional Authority of Congress.

This issue is not limited to the abortion question; the inviolable and exclusive power of the purse is one that touches on all of what Congress does. To tamper with that exclusive power is to tamper with the very essence of constitutional, representative government. Once done, Congress could become a mere bookkeeper for a judiciary, or even executive, that has arrogated unto itself a power denied it by the framers of our system.

So clearly has this been understood that some of the harshest language ever used to describe a violation of the separation of powers has been used with respect to this problem. Montesquieu wrote:

> "Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined with the executive power, the judge might behave with violence and oppression."

THE SPIRIT OF THE LAWS, 154 (6th ed. 1792, T. Nugent, trans.).

Madison was even more direct on the proper view of the appropriations power in his Federalist Paper No. 58:

> "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."

THE FEDERALIST No. 58 at 380 (Modern Library ed.) (J. Madison). Hamilton was equally adamant in his Federalist Paper No. 78:

> "The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment.

Id. at 504. Congress' exclusive power of the purse, therefore, has its roots in clear and unambiguous history.

With unblemished consistency this Court, and the federal courts in general have understood and respected

this very basic separation of powers between Congress and Court. Whenever the issue has been raised this Court has concluded that an appropriation by Congress is required before moneys may be drawn from the federal Treasury. *Knote v. United States,* 95 U. S. 149 (1877); *Austin v. United States,* 155 U. S. 417 (1894); *Hart v. United States,* 118 U. S. 62 (1868); *Reeside v. Walker,* 52 U. S. (11 How.) 623 (1850). And see *Cincinnati Soap Co. v. United States,* 301 U. S. 308 (1937); *United States v. Lovett,* 328 U. S. 303 (1946).

The Civil War gave this Court several opportunities to confront the appropriations question. After that war numerous controversies arose over Congressional attempts to limit the payment of the claims of persons who had aided the Rebellion, but who had subsequently received Executive pardons. In *Knote v. United States, supra,* President Johnson pardoned petitioner Knote for his part in the Civil War and relieved him of all disabilities and penalties attaching to his rebellion. Pursuant to that pardon Knote sought to recover the proceeds of his property previously condemned and sold under an earlier confiscation act. At the time of his claim the proceeds had already been paid into the U. S. Treasury.

Counsel for Knote raised the issue squarely: "The proceeds of the sale of the claimants' property are held by the government. . . . His right to them under the pardon imposes legal obligations on the government, and *may be judically enforced.*" *Knote v. Untied States, supra,* at 151 (emphasis added) This Court's reply was equally clear: Undoubtedly Knote had a right to the restoration of his property, but ". . . if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only *be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law.*" *Id.* at 154 (emphasis supplied).

Contrary to the argument of the petitioner's counsel, this Court held that no judicial remedy could draw funds from the Treasury; such was beyond the control of the Court: *See also, Austin v. United States,* 155 U. S. 417 (1894); *United States v. Klein,* 13 Wall. (80 U. S.) 128 (1872) and *Hart v. United States,* 118 U. S. 62 (1886).

In *Reeside v. Walker, supra,* the estate of James Reeside sought and won a set-off of its claims against those of the United States. The jury found that the government was, in fact, indebted in the amount of $188,496.06. In an attempt "[t]o save future expense and litigation in [the] case, with a view to obtain[ing] the desired judgment" this Court articulated the clear and unambiguous rule that a court may not order the Treasury to pay out unappropriated moneys:

"No officer, however high, not even the President, much less a secretary of the treasury or treasurer is empowered to pay debts of the United States generally, when presented to them. If, therefore, the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the treasury department, the plaintiff would be as far from having a claim on the secretary or treasurer to pay it as now. The difficulty in the way is the want of any appropriation by congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the treasury except under an appropriation by congress. See Constitution, Art. I, § 9, I Stats. at Large, 15.

"However much money may be in the treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.

> "Hence, the petitioner should have presented her claim on the United States to congress, and prayed for an appropriation to pay it. If congress after that make such an appropriation, the treasury can, and doubtless will, discharge the claim without any *mandamus*. But without such an appropriation it cannot and should not be paid by the treasury, whether the claim is by a verdict or judgment, or without either, and no *mandamus* or other remedy lies against any officer of the treasury department, in a case situated like this, where no appropriation to pay it has been made. 52 U. S. (11 How.) 626-28 (emphasis by the Court).

Thus, even in the face of a binding obligation or judgment, or an unconstitutional withholding of funds in the Treasury, no court may order the funds to be paid where not authorized by Congress. *Stitzel-Weller Distillery v. Wickard,* 118 F. 2d 19 (1941); *Collins v. United States,* 15 Ct. Cl. 22 (1878); *Doe v. Matthews,* 420 F. Supp. 865 (D. N. J. 1976). And see *Cincinnati Soap Co. v. United States,* 301 U. S. 308 (1937); *Spaulding v. Douglas Aircraft Co., Inc.,* 60 F. Supp. 985 (S. D. Cal. 1945). In the case at bar, appellees are requesting precisely such relief since they seek not merely a declaration of rights, but an order to spend funds expressly not appropriated.

Again, in *United States v. Lovett, supra,* this Court and the Court of Claims had occasion to apply the rule against court-ordered appropriations. *Lovett* was a challenge to an appropriations measure that provided that certain named government employees not be paid their salaries unless Congress confirmed their continued employment. The three named individuals continued to work despite the Congressional act and sued for their compensation in the Court of Claims. That court decided that the claimants were entitled to the money, but did not

entertain the illusion that it could order the Treasury to pay, or the Congress to appropriate, the funds:

> "Congress, by enacting Section 304, did not foreclose itself from thereafter appropriating for the payment of these salaries. Congress even now *may* appropriate, and authorize a selected disbursing agency to pay them. Claims therefor, presented to Congress, *may* be satisfied by an appropriation to pay them, as claims. Judgments, recovered here, *may* be satisfied by any appropriation out of which the judgments *may* be by Act of Congress, payable."

Lovett v. United States, 66 F. Supp. 142, 147 (Ct. Cl. 1945) *affirmed on other grounds, United States v. Lovett,* 328 U. S. 303 (1946). (Emphasis supplied.) The order of the Court of Claims that the plaintiffs were "entitled to recover" specific dollar amounts was the authorization of payment; but as with the usual congressional authorization, an appropriations act was necessary to provide the money.[2]

This Court affirmed the Court of Claims and held the salary prohibition an unconstitutional bill of attainder. But again, no order was made to appropriate or pay the funds. That determination was properly left to Congress. This Court did not reach back to the appropriation, strip it of the salary prohibition, and order payment as though the funds had been appropriated and illegally constrained.

In Congress there was at first disinclination to provide the funds to meet this Court's judgment. The most outspoken congressman in favor of honoring the judgment admitted that it was within the power of Congress to provide the money or not. Congressman Javits, for example, urged that the Deficiency Subcommittee "again consider this matter" 93 CONG. REC. 2977 (1947). Congressman Gwynne observed: "Of course we have the power to refuse

2. See Rule XXI, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, ed. Deschler, sec. 837.

to appropriate the money" while urging that it was "duty of Congress to vote the money." *Id.* at 2990. Congressman John F. Kennedy suggested that it was "a question of whether the House should honor a decision of the Supreme Court." *Id.* at 2989; and he went on to say: "If because we have the power in this chamber to do so, we should hold back part of this money and not honor the decision of the Supreme Court, we would be breaking down that division [of the three powers] . . . this claim should be honored." *Id.* at 2990. Congressman Keating, also speaking in favor of providing money to satisfy the judgment, observed as to the successful plaintiffs: "The only way they can translate their piece of paper called a judgment into cash in hand is through an appropriation made by this Congress." *Id.* at 2990. The plaintiffs would never have been compensated had not a nearly evenly divided House—after long debate—subsequently voted 99-98 to pay the amount due under the decision. 93 CONG. REC. 2973-75, 2977, 2987-91 (1947).

The long-standing respect for the appropriation power evidenced in the opinions of this Court has been similarly reflected in lower court decisions. On the very issue raised by the case at bar one district court judge reached the exact opposite conclusion of the court below. In *Doe v. Matthews,* 420 F. Supp. 865 (D. N. J. 1976) Judge Buinno faced a challenge to the Hyde Amendment; his opinion reached the heart of the issue:

> "[N]one of the cases relied on deal with one obvious question raised by the challenge to the Hyde Amendment, namely, the impact of the provision in the United States Constitution, Art. I § 9 cl. 7 that:
>
> > 'No money shall be drawn from the Treasury but in consequence of appropriations made by law'
>
> Neither the complaint, the moving papers nor the initial brief discusses this question. Yet it cannot be avoided because, on the record before the Court, the Congress simply has not appropriated any moneys for fiscal 1977 to reimburse Medicaid States with a federal share for elective abortions." *Id.* at 870.

Judge Buinno has stated well the rule that must govern this case. No court has ever done what the court below has done.

The Sources of the District Court's Error.

When the district court first ruled in the instant case, twenty-two days after the law went into effect in 1976, and ordered the Secretary of HEW to pay for abortions throughout the country contrary to the appropriations act, the court was under the impression that it had a precedent in the *Lovett* case. See opinion of Dooling, J., in *McRae v. Matthews,* 421 F. Supp. 533, 540-541 (E. D. N. Y. 1976). Plainly, however, the court misread *Lovett* and reached a result directly counter to the self-restraint exercised by the judiciary in *Lovett.* Ruling again in the instant case almost four years later, the court below has put its chief reliance on a very recent decision of this Court which, arising after his initial ruling, seems now to it to justify its extraordinary action in October, 1976, and its return to it in January, 1980. The district court has invoked *Califano v. Wescott,* — U. S. —, 61 L. Ed. 2d 382 (1979), decided by a vote of five to four. The court has, however, ignored two vital differences between this recent case and the instant case: First, in *Wescott,* the appropriations issue was not argued to this Court. As the Court observed, the federal appellant did "not question the relief ordered by the District Court." *Id.* at 387 (L. Ed. 2d). Consequently *Wescott* cannot be construed as having disregarded a section of the Constitution and as a departure from an old and settled line of decisions. Second, in the act there under consideration there had been no exercise

by Congress of the *appropriations* power. Congress had restricted certain benefits to unemployed fathers. It had not refused to appropriate money for unemployed mothers. It had inserted a broad severability clause, 42 U. S. C. sec. 1303. A single federal judge was not commanding, where Congress had said "No appropriation", that an appropriation be made.[3]

The district court's extraordinary action is based not only on its misreading of *Lovett* and *Wescott*, but also on its belief, disclosed in its opinion, that the ability of a federal judge to declare a portion of an appropriations act unconstitutional is "the inescapable responsibility of the judiciary." (Slip op. 291-292). This confuses the power of judicial review with the power to appropriate money.

The court below goes on to cite five cases—*The Abortion Cases* (*Wade* and *Bolton*) and *The Abortion Funding Cases* (*Beal, Maher* and *Poelker*)—to show that the federal courts can pronounce on the constitutionality of law dealing with abortion. While no one would deny that, none of the cases cited has any bearing on the power of a single federal judge to appropriate money or draw it from the Treasury of the United States.

In the court's opinion appears to lurk the fear that if a federal judge cannot control a Congressional appropriation, Congress will appropriate money for all sorts of unconstitutional purposes without check or balance from the other branches of government. But as *Lovett* makes clear, if an appropriations act does offend against an express command of the Constitution, there is adequate check and balance in the power of the judiciary to declare the act

3. The District Court had also invoked the teaching of Mr. Justice Harlan, concurring in *Welsh v. United States*, 398 U. S. 333 (1970), on a court's power to extend the exemptions of a statute. But neither Mr. Justice Harlan in *Welsh*, a case involving exemptions for conscientious objectors, nor this Court in *Wescott*, a case involving an authorization statute with a severability clause, had addressed the appropriations power or contemplated a challenge to the exercise of that power by Congress.

unconstitutional. What the Constitution forbids in Article I, Section 9, is not judicial review but judicial intrusion into the legislative powers and judicial usurpation of the power of the purse.

If this Court should find that a provision of the Appropriations Act for the Departments of Labor and HEW transgresses a command of the Constitution, the Court is free to declare that provision of the Act unconstitutional, leaving Congress the option of not funding these departments or complying with the Court's criteria of constitutionality. Such a remedy, while harsh, is far from vain. It is what in actuality is the appellees' remedy if they are correct in their claim that the appropriations act is unconstitutional. What it has not power to do is to make a nonexistent appropriation into an appropriation.

The judicial power of injunctive relief, exercised negatively, goes to the very limit of encroachment on the appropriations power yet still does not convert a nonappropriation into an appropriation; but injunctive relief, exercised selectively and positively as in the instant case, creates an appropriation where none was intended, where indeed an appropriation was denied. The power is a great power which, no doubt, will be exercised sparingly because of the possibility of catastrophic ramifications; the denied power is a great power which, as in this case, may be exercised mistakenly and must inevitably substitute judges for legislators as the holders of the power of the purse.

But the question may then arise, whether a declaration of unconstitutionality without an order of payment is an illusory remedy. Clearly, it is not. If an act of Congress is truly so extreme that it violates the Constitution, and this Court exercises its power to so indicate, it cannot be supposed that Congress would be insensitive to such teaching of this Court. But it is not within the constitutional power of this Court to compel Congress to appropriate where it chooses not to appropriate.

The "inescapable responsibility of the judiciary" is to exercise the judicial responsibility entrusted to judges by Article III of the Constitution. It is ironic that a district court, invading the power of Congress to appropriate, should defend its action as observing what "is intrinsic to the separation of powers." (Slip op., 292). What is intrinsic to the separation of powers is that each branch of government exercise responsibly the power entrusted to it by the Constitution. Each branch, as this Court has stated, "must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others," but the basic powers of each branch, such as the veto power of the Executive, cannot be shared. *United States v. Nixon,* 418 U. S. 683, 704 (1974). The power to appropriate is unshareable.

II. The District Court Erred in Not Dismissing the Action as Nonjusticiable in That It Presented a Political Question.

In the first part of this brief, *amici* have assumed, *arguendo,* that *U. S. v. Lovett, supra,* applies, and that this therefore was the kind of case in which judicial review of an appropriations act is in order. In this second part of the brief, *amici* put aside that assumption. *U. S. v. Lovett* dealt with a rare kind of appropriations act—an act of Congress found to be in violation of a specific provision of the Constitution and in violation of the rights of three named persons. Like a court order, that act operated upon those persons immediately and directly, and, as the court held, without trial and unjustly, to divest them of individual rights. The act there in question was very different from the appropriations act now before this Court. For the reasons stated below, *amici* submit that *U. S. v. Lovett* does not govern here, and that the issue presented in this case, because it presents a political question, is nonjusticiable.

The "political question" doctrine has long informed this Court's decisions on the justiciability *vel non* of certain constitutional issues. The most thorough and oft-cited description of this doctrine is that of Mr. Justice Brennan in *Baker v. Carr,* 369 U. S. 186 (1962). The essence of the doctrine is "the relationship between the judiciary and the coordinate branches of the Federal Government. . ." *Id.* at 210. Further, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Ibid.* Justice Brennan defined the doctrine in the following language:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Id. at 217. While the doctrine requires that only "one of these formulations [be] inextricable from the case at bar" in order to effect a "dismissal for nonjusticiability on the ground of a political question's presence", the instant case involves five of these criteria.

The view of the district court that this case is an act ruled by *U. S. v. Lovett, supra,* is plainly erroneous. That case concerned an extraordinary provision refusing to appropriate salaries for three named persons, an act amount-

ing to a bill of attainder. Like a court order it operated to punish these persons. The appropriation in question there involved standards entirely manageable by a court. It did not involve, as does this case, a broad issue of social policy on which the electorate and the elected members of Congress have repeatedly expressed themselves.

1. Textual Commitment of the Power to Congress.

The appropriations clause of the Constitution is found under Article I thereof which defines legislative powers. The appropriations power is textually committed to Congress. In addition, the statement in that clause, "made by Law", plainly refers to appropriations made by and through the prescribed Congressional procedures. Article I, Section 1, vests all law-making powers ("[a]ll legislative powers") in the Congress. Consequently, there is no clearer statement in the Constitution that a power is textually committed to a coequal branch. It is similar to the statement of Article I, Section 8, Clause 16 which vests in Congress the power "[t]o provide for organizing, and disciplining, the militia. . ."

In *Gilligan v. Morgan*, 413 U. S. 1 (1973) this Court held that this "militia power" was exclusive to Congress and that the Court could not, as plaintiffs asked, evaluate the training of the Ohio National Guard to see whether it was constitutionally deficient under the due process clause. This Court's reasons for finding nonjusticiability in *Gilligan* are similar to the reasons why the action brought by the plaintiffs below should have been dismissed as nonjusticiable:

> "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence."

Id. at 10. This Court went on to say that such issues must remain "[t]he ultimate responsibility [of] branches of the government which are periodically subject to electoral accountability." *Ibid.*

Those words seem tailored for the instant case. The judicial branch has been consciously excluded from the appropriation decision both because it lacks competence in that area, and because such decisions *must* be made by popularly elected representatives who can reflect the will of their constituencies.

2. Lack of Judicially Manageable Standards.

Once it should be held that the appropriations power may be usurped by the courts, the use of that power will predictably not be limited to abortions. A multitude of financial and budgetary questions will be laid at the courthouse door. Every loser in the representative processes will seek a judicial appropriation for his program. Consequently, the courts will consistently be asked to allocate scarce financial resources—allocations that should be made by the elected representatives of the people of the United States.

Consider the examples cited earlier from appropriations acts of 1978. The appropriations act for the State Department says that "None of the funds appropriated in this title shall be used . . . for the promotion, direct or indirect, of the principle or doctrine of one world government," 92 Stat. 1025 (1978). Surely the advocates of one world government have a right of free speech guaranteed by the First Amendment which is no whit inferior to the right to free exercise of religion which the court below has made one basis for its order commanding that public money be spent for abortions. (Slip op. 326-328.) Under

the holding of the district court, an advocate of one world government may now challenge the constitutionality of the State Department appropriations act because it denies him money to support his constitutional right of speech.

Or consider the language of the Labor-HEW Appropriations Act cited earlier, which operates to deny federal unemployment benefits to an alien illegally in the country. 92 Stat. 1571 (1978). As an alien has certain constitutional rights, he may now, under the teaching of the court below, litigate to strike such a provision and collect his unemployment pay on the ground that denial of appropriations for this purpose is a denial to him of the very means of subsistence.

Or take the language of the same Act forbidding loan or salary to a student who after 1969 used force to attempt to change college policy on curricula. 92 Stat. 1589. No doubt such a student has a case to make that such discrimination is a penalty imposed without due process of law. Is he free, it may be asked, to litigate his claim and succeed in getting his benefit if somewhere in this country he finds a federal judge who thinks Congress' refusal to appropriate was unconstitutional?

There are as many differences and distinctions drawn in appropriations acts as there are in tax laws. The very recent study by Fischer on the authorization-appropriations process [4] provides a multitude of examples of the essentially political process of appropriating and refusing to appropriate. Unless this Court is to command uniformity of treatment in the name of Due Process or Equal Protection, each distinction and each difference can be turned so as to present a constitutional difficulty. This Court and the lower federal courts will have to enter wholeheartedly into the appropriations process and weigh and determine a vast variety of cases.

4. L. Fisher, The Authorization-Appropriations Process: Formal Rules and Informal Practices (Congressional Research Service, Library of Congress, 1979).

3. Impossibility of Deciding Without a Policy Determination of a Kind Clearly for Nonjudicial Discretion.

Nothing can be clearer than the fundamentally legislative nature of appropriations decisions. Who shall be funded and who shall not is at the heart of the legislative process. Any judicial appropriation for abortions requires an initial policy decision that something else not be funded. Any judicial order to expend money for abortion puts the federal judiciary squarely in the legislative area. See J. Noonan, A Private Choice, 112-117 (1979).

4. Expression of Lack of Respect Due a Coordinate Branch of Government.

Almost a century ago an acute observer of our institutions, James Bryce, wrote: "There remains the power which in free countries has long been regarded as the citadel of parliamentary supremacy, the power of the purse. Congress has the sole right of raising money and appropriating it to the service of the state." Bryce, The American Commonwealth, 158 (Macmillan, 1905). It is this citadel which the district court's order has subverted, and this Court is asked to ratify that subversion.

The Majority Leader of the House, Congressman Jim Wright, an *amicus* here, has expressed the deep concern the House has felt at this sudden challenge to its basic power:

> "Whatever one's feeling may be as to the social ethics involved, surely the right of Congress to enact a specific limitation on the use of tax moneys for any such purpose is a right long established. It is a right without which Congress could not perform its duty to the American taxpayer.

> "That right is indispensable to the legislative branch in carrying out its constitutional responsibility, and I trust that the Supreme Court will speedily and decisively reaffirm that right in this case."

126 CONG. REC. 1062 (1980). Abortion aside, the lower court ruling treats Congress as the stepchild in our constitutional system.

5. Unusual Need for Unquestioning Adherence to a Political Decision Already Made.

Here again the words of Madison are of value: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST No. 58, at 380 (Mod. Lib. ed.) (J. Madison). The amount of money affected by the district court's order may be estimated, on the basis of earlier experience, as at least $88 million (see *The Washington Post*, February 20, 1980, A 14). If this money is used for the purpose rejected by Congress and required by the court below, less money will be available for needs for which Congress did appropriate. It does not seem to lie within the competence of the judiciary to determine the seriousness of the needs Congress sought to meet—no data on them has been presented in this process. Nor does the judiciary appear to have the competence to determine what needs will then go unmet or to forecast the response of Congress to a judicial redistribution of federal funds.[5] There is an unusual need, therefore, for the judiciary to adhere to the political decision already made as to the appropriation.

A more obvious example of a political question is difficult to imagine. Not one, but five, of Mr. Justice Brennan's criteria are met in the case at bar. Overriding all is his admonition that primarily the doctrine is concerned with the separation of powers. A judicial usurpation of the appropriations power is no less a threat to the separation of powers than would be a usurpation of the militia power, or the war power, or the taxing power. These are simply not powers that were intended for the judiciary. They were intended for the people's most immediate representatives: the Congress of the United States.

The very first words of Article I of our Constitution are: "All Legislative Powers herein granted shall be vested in a Congress of the United States. . ." A matter that has been hotly contested within each body of the Congress and between the two bodies, a matter which has been an issue in municipal and state and national legislatures is indisputably legislative, and it is difficult to believe that any issue could be more political. No doubt members of the federal judiciary have strong views as to what the right outcome of the political contest should be. A number of these judges have not concealed their opinions. Members of the judiciary are called, not to further the political cause they think is right, but to respect the foundations of our government of separate and limited powers, of which the power of the purse is democratically entrusted to the Congress.

5 The statement of Mr. Justice Stewart is apropos:

> "We do not decide today that the Maryland regulation [limiting total amounts allotted to families with dependent children under Title IV of the Social Security Act] is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure. . . . But the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge v. Williams*, 397 U. S. 471, 487 (1970).

CONCLUSION.

For all of the foregoing reasons, it is respectfully requested that the judgment of the district court, violating Article I, Section 9, Clause 7 of the Constitution, violating the principle of separation of powers, and representing an exercise of jurisdiction to resolve a political question contrary to Article III, be reversed.

Respectfully submitted,

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March 18, 1980

CERTIFICATE OF SERVICE.

I hereby certify that on this 18th day of March, 1980, three copies of the Brief *Amicus Curiae* were mailed, postage prepaid, to Wade H. McCree, Jr., Esq., Solicitor General of the United States, Department of Justice, Constitution Avenue between Ninth and Tenth Streets, N. W., Washington, D. C. 20530, Richard P. Caro, Esq., 225 Cadman Plaza East, Brooklyn, N. Y. 11201, counsel to appellee, Rhonda Copelon, Esq., 853 Broadway, New York, N. Y. 10016, Janet Benshoof, Esq., 22 East 40th Street, New York, N. Y. 10016, Sylvia A. Law, Esq., 40 Washington Square South, New York, N. Y. 10012, Jill Laurie Goodman, Esq., 22 East 40th Street, New York, N. Y. 10012, Nadine Taub, Esq., 14 Washington Street, Newark, N. J. 07102, counsel for appellee women and medical doctors and for appellee Women's Division of the Board of Global Ministries of the United Methodist Church, Harriet F. Pilpel, Esq., 437 Madison Avenue, New York, N. Y. 10022, counsel for appellee Planned Parenthood of NYC, Inc., Ellen Kramer Sawyer, Esq., 125 Worth Street, #523, New York, N. Y. 10013, counsel for appellee New York City Health and Hospital Corporation, Patrick A Trueman, Esq., AUL Legal Defense Fund, 230 North Michigan Avenue, Chicago, Ill. 60601, counsel to intervenors-appellees. I further certify that all parties required to be served have been served.

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